

EUGENE A. MAUWEE, SR.,)	3:10-cv-00250-RCJ-WGC
)	
Plaintiff,)	<u>REPORT & RECOMMENDATION</u>
)	<u>OF U.S. MAGISTRATE JUDGE</u>
vs.)	
)	
JACK PALMER, et. al.)	
)	
Defendants.)	
)	

After a thorough review, the court recommends that Defendants' motion be granted in part and denied in part.

At all relevant times, Plaintiff Eugene Mauwee was in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Am. Compl. (Doc. # 28 at 1).) Plaintiff, a pro se litigant, brings

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1 this action pursuant to 42 U.S.C. §1983. (*Id.*) The events giving rise to this action took place
2 while Plaintiff was housed at Lovelock Correctional Center (LCC). (*Id.*) Defendants are
3 Correctional Officer Jonathan Ball, Associate Warden (now Warden) Robert LeGrand, (former)
4 Warden Jack Palmer and (former) NDOC Deputy Director Don Helling. (*See* Screening Order
5 (Doc. # 29).)

7 Plaintiff asserts two claims under the Due Process Clause of the Fourteenth Amendment
8 and Free Exercise Clause of the First Amendment. (Doc. # 29.)² Plaintiff alleges that he is a
9 Native American and self-described elder and spiritual leader of Native American religious
10 activities at LCC. (Doc. # 28 at 5.) He contends that defendant Ball confiscated an eagle talon on
11 June 19, 2007, which he contends is a sacred Native American religious artifact, that was in his
12 possession and which he had used in many LCC religious ceremonies. (*Id.* at 4, 5.) He then
13 utilized NDOC's grievance system to attempt to have the talon returned to him. (*Id.* at 4.) He
14 avers that defendants LeGrand, Palmer and Helling denied his grievances, apparently on the
15 basis that the talon had been deemed a security threat under NDOC policy. He was later
16 informed, on March 24, 2010, that the talon was destroyed on August 16, 2007, approximately
17 three and a half months before Plaintiff completed the grievance process. (*Id.* at 4.) He indicates
18 that none of the grievance responders told him about the destruction of the talon. (*Id.*) He claims
19 he was deprived of any opportunity to arrange to send the talon home. (*Id.* at 5.) He contends that
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24 ² Plaintiff originally submitted his complaint for filing on April 28, 2010. (Doc. # 1.) The complaint was screened
25 and dismissed with prejudice because the court found Plaintiff alleged an intentional deprivation of property and had
26 an adequate post-deprivation remedy. (Doc. # 9.) Plaintiff appealed. (Doc. # 14.) The Ninth Circuit affirmed in part,
27 reversed in part and remanded. (Doc. # 20.) Among other things, the Ninth Circuit found the court erred in
28 dismissing the Fourteenth Amendment claim based on the availability of adequate state-law post-deprivation
remedies because Plaintiff challenged the destruction of property under *established state procedure* (thereby
indicating he was not challenging an *intentional, unauthorized deprivation* which would not state a claim if adequate
post-deprivation remedies exist). (*Id.*) The Ninth Circuit also stated that Plaintiff should have been given an
opportunity to amend to state a First Amendment claim under the Free Exercise Clause. (*Id.*) The amended
complaint and screening followed, resulting in the current status of the claims.

1 destruction of the talon prior to completion of the grievance process violates his due process
2 rights. (*Id.* at 6.) He also states that Defendants did not offer Plaintiff any other "method" of
3 utilizing the talon in religious ceremonies at LCC. (*Id.* at 5.) He alleges that the confiscation and
4 destruction of the talon affected his ability to practice his religion at LCC. (*Id.*)

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6 Defendants move for summary judgment, arguing that Plaintiff's claims are barred by the
7 applicable two-year statute of limitations. (Doc. # 50.) Defendants reason the confiscation of the
8 talon occurred on June 19, 2007; however, even taking into account for tolling while Plaintiff
9 completed the grievance procedure (which Plaintiff completed on November 28, 2007), Plaintiff
10 submitted this action for filing on April 28, 2010—outside the two-year statute of limitations
11 which would have expired on November 28, 2009. (*Id.* at 4.)

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13 Plaintiff has opposed the motion, asserting that the Ninth Circuit has already overruled
14 this argument. (Doc. # 53.)

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16 In their reply, Defendants contend that neither this court nor the Ninth Circuit has
17 addressed the issue of the timeliness of Plaintiff's action, and the fact remains that Plaintiff failed
18 to bring this action within the applicable two-year statute of limitations. (Doc. # 55.)

19 **II. LEGAL STANDARD**

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21 “The purpose of summary judgment is to avoid unnecessary trials when there is no
22 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
23 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). All reasonable inferences are drawn in favor
24 of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v.*
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment is appropriate if “the
26 pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no
27 genuine issue as to any material fact and that the movant is entitled to judgment as a matter of
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law.” *Id.* (quoting Fed.R.Civ.P. 56(c)).¹ Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. *See Anderson*, 477 U.S. at 250. The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the parties may submit evidence in an inadmissible form, only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c).

In evaluating the appropriateness of summary judgment, three steps are necessary: (1) determining whether a fact is material; (2) determining whether there is a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) considering that evidence in light of the appropriate standard of proof. *See Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

In determining summary judgment, a court applies a burden shifting analysis. “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.’[] In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or

¹Federal Rule of Civil Procedure 56 was amended in 2010 to state: “The court shall grant summary judgment if the movant shows that there is no genuine *dispute* as to any material fact and the movant is entitled to judgment as a matter of law.” (Emphasis added.) The analysis under the cases cited, however, remains the same.

1 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
2 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
3 party failed to make a showing sufficient to establish an element essential to that party's case on
4 which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323-25. If the
5 moving party fails to meet its initial burden, summary judgment must be denied and the court
6 need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.
7 144, 160 (1970).

9 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
10 establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
11 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
12 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
13 that "the claimed factual dispute be shown to require a jury or judge to resolve the parties'
14 differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*,
15 809 F.2d 626, 630 (9th Cir. 1987)(quotation marks and citation omitted). The nonmoving party
16 cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported
17 by factual data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the
18 pleadings and set forth specific facts by producing competent evidence that shows a genuine
19 issue for trial. *See Fed.R.Civ.P. 56(e); Celotex*, 477 U.S. at 324.

21 At summary judgment, a court's function is not to weigh the evidence and determine the
22 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
23 While the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be
24 drawn in its favor," if the evidence of the nonmoving party is merely colorable or is not
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significantly probative, summary judgment may be granted. *Id.* at 249-50, 255 (citations omitted).

III. DISCUSSION

Preliminarily, Defendants are correct that the Ninth Circuit did not address the subject of whether Plaintiff's claims are barred by the applicable statute of limitations. (*See* Doc. # 20.) As such, the court will turn to its analysis of this issue.

A. Statute of Limitations for Section 1983

Section 1983 does not contain its own statute of limitations; federal courts borrow the statute of limitations for section 1983 claims applicable to personal injury claims in the forum state. *See Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985); *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000) (citation omitted); *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). In Nevada, the statute of limitations for personal injury claims, and therefore § 1983 actions, is two years. Nev. Rev. Stat. § 11.190(4)(e); *see also Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989).

"A statute of limitations begins to run on the date on which the plaintiff's claim 'accrues.'" *Pouncil v. Titon*, 704 F.3d 568, 573 (9th Cir. 2012) (citation omitted). "Federal law determines when a cause of action for a Section 1983 claim accrues and, hence, when the statute of limitations begins to run." *Id.* (citation omitted). "Under federal law, a claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Johnson*, 207 F.3d at 653 (citation omitted).

Federal courts also apply the forum state's law regarding tolling, including equitable tolling, when not inconsistent with federal law, to civil rights claims filed under section 1983. *Johnson*, 207 F.3d at 653 (citations omitted). "[T]he applicable statute of limitations must be

1 tolled while a prisoner completes the mandatory exhaustion process.” *Brown v. Valoff*, 422 F.3d
 2 926, 942-43 (9th Cir. 2005) (citations omitted).

3 The central question here is when Plaintiff knew or should have known of the injury
 4 which is the basis of his claims. The court will now address that inquiry with respect to each of
 5 Plaintiff's claims
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7 **B. First Amendment Free Exercise Clause**

8 As to Plaintiff's First Amendment claim, the crux of the allegations is that once the talon
 9 was confiscated, he was no longer allowed to use it in the performance of Native American
 10 religious ceremonies at LCC. (*See* Doc. # 28 at 5.) Plaintiff specifically alleges that Defendants
 11 did not offer Plaintiff any other "method" of utilizing the talon in religious ceremonies at LCC.
 12 (*Id.* at 5.) He further asserts that the confiscation and destruction of the talon affected his ability
 13 to practice his religion at LCC. (*Id.*) This makes sense in the context of the Free Exercise
 14 Clause, which is retained by prisoners, *see O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348
 15 (1987) (citations omitted), as it prohibits prison officials from denying an inmate a reasonable
 16 opportunity to pursue his faith comparable to that afforded to other religious adherents. *See*
 17 *Hartmann v. California Dep't of Corrections*, 707 F.3d 1114, 1122 (9th Cir. Feb. 19, 2013)
 18 (citation and quotation marks omitted).
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22 Thus, Plaintiff knew about the injury which is the basis of his First Amendment claim—
 23 the confiscation of the talon³—on June 19, 2007. (*See* Doc. # 28 at 4.) The statute of limitations
 24 period was then tolled until November 28, 2007, when Plaintiff completed the grievance process.
 25 Therefore, Plaintiff's First Amendment claim is barred by the two-year statute of limitations
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 28 ³ As will be discussed *infra*, this is different from Plaintiff's Fourteenth Amendment claim, which focuses on the destruction of the talon prior to completion of the grievance process.

1 because it should have been filed on or before November 28, 2009.⁴ Accordingly, the court
2 recommends that summary judgment be granted in Defendants' favor as to Plaintiff's First
3 Amendment claim because it is barred by the two-year statute of limitations.
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5 **C. Fourteenth Amendment Due Process Claim**

6 The more difficult question is when Plaintiff knew or should have known of the injury
7 that is the basis of his Fourteenth Amendment due process claim. This involves an analysis of
8 what injury is actually the basis of this claim. Is it the confiscation of the claw or its ultimate
9 destruction, which Defendants appear to concede Plaintiff did not know of until March 24, 2010?
10 (*Id.* at 4.)
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12 Plaintiff alleges that the talon was confiscated in June 2007. He then commenced the
13 grievance process to try to get it back. He did not find out until March of 2010 that the talon was
14 destroyed on August 16, 2007, over three months before he even had a chance to complete the
15 grievance process. (Doc. # 28 at 4.) He also avers that none of the grievance responders bothered
16 to notify him of the talon's destruction in their responses. (*Id.*)
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18 Based on a review of Plaintiff's allegations, the crux of the Fourteenth Amendment due
19 process claim, as opposed to the First Amendment claim, is the destruction of the talon. Plaintiff
20 is asserting that he was deprived of his property interest in the talon when it was destroyed. He
21 contends he was denied his due process rights because he was not afforded a meaningful
22 opportunity to get it back or send it home because it was destroyed before he could even
23 complete the procedural process seeking its return. Defendants do not appear to dispute that
24 Plaintiff was not apprised of the destruction of the talon until March 24, 2010. Nor is there any
25 other evidence before the court that would suggest Plaintiff knew or should have known of the
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28 ⁴ While neither party addresses it, the court is assuming relation back of the amendment asserting the First Amendment claim to the filing of the original complaint.

1 August 16, 2007 destruction of the talon before that point. Accordingly, the court recommends
2 that Defendants' motion for summary judgment be denied as to Plaintiff's Fourteenth
3 Amendment due process claim.⁵
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5 **IV. RECOMMENDATION**

6 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING**
7 **IN PART AND DENYING IN PART** Defendants' Motion for Summary Judgment (Doc. 50) as
8 follows:

9 (1) Defendants' Motion for Summary Judgment should be **GRANTED** as to Plaintiff's
10 First Amendment claim; and
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12 (2) Defendants' Motion for Summary Judgment should be **DENIED** as to Plaintiff's
13 Fourteenth Amendment due process claim.
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15 The parties should be aware of the following:

16 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local
17 Rules of Practice, specific written objections to this Report and Recommendation within fourteen
18 (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report
19 and Recommendation" and should be accompanied by points and authorities for consideration by
20 the District Court.
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28 ⁵ To the extent Plaintiff's complaint can be construed as alleging a due process claim based on just the *confiscation*
of the talon, such a claim would be barred by the statute of limitations.

1 2. That this Report and Recommendation is not an appealable order and that any notice of
2 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
3 until entry of the District Court's judgment.
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5 DATED: December 19, 2013.
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8 **WILLIAM G. COBB**
9 **UNITED STATES MAGISTRATE JUDGE**
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